

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NICLAS FOSTER,

Plaintiff,

v.

AMERICAN HONDA MOTOR COMPANY,
INC., *et al.*,

Defendants.

CASE NO. C17-1727-JCC

ORDER

This matter comes before the Court on Defendants' motion to exclude testimony (Dkt. No. 28). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES Defendants' motion for the reasons explained herein.

I. BACKGROUND

Plaintiff is the personal representative of the estate of Meike Foster. (Dkt. No. 1-2 at 2.) In 2014, Ms. Foster burned to death inside her Honda CR-V, after the vehicle caught fire. (Dkt. No. 31 at 2.) The CR-V was found off the road on a bed of ivy, and no one witnessed the fire start. (*Id.*) Plaintiff filed this products liability action against Defendants alleging that the CR-V had a design defect that led to the fire causing Ms. Foster's death. (Dkt. No. 1-2 at 4-5.)

Throughout this lawsuit, the parties have agreed to, and the Court has entered, several

1 stipulations regarding the disclosure of expert witnesses. (*See* Dkt. Nos. 18–25.) On August 3,
2 2018, the Court entered the following expert disclosure deadlines pursuant to stipulation:

3 Plaintiff's Expert Disclosures (FRCP 26(a)(2))	October 26, 2018
4 Defendants' Expert Disclosures (FRCP 26(a)(2))	November 27, 2018
5 Plaintiff's Rebuttal Expert Disclosures	January 4, 2019
6 Defendants' Rebuttal Expert Disclosures	February 4, 2019

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8 (Dkt. No. 23.) On October 26, 2018, Plaintiffs disclosed the report of Mark Arndt, who opined as
9 to the CR-V's alleged design defects. (Dkt. No. 28 at 3.) Arndt concluded that the probable
10 origin of the fire “was ignition of organic debris accumulated or trapped near the [car's] catalytic
11 converter,” and that “[i]n my opinion failure to shield the catalytic converter was a defect in the
12 design of the vehicle and was compounded by the plastic panels that enclose the engine
13 compartment and other areas of the exhaust system.” (*Id.*)

14 On November 27, 2018, Defendants disclosed the reports of a fire expert, Larry Brown,
15 and an engineering expert, Dr. Robert Scheibe. (Dkt. No. 30 at 7.) In contrast to Arndt's opinion
16 that the fire was caused by organic debris inside the vehicle, Brown concluded that the fire “was
17 caused by the duff and ground cover under the vehicle after it left the paved road way.” (*Id.*)
18 Scheibe similarly concluded that the car likely ran over “flammable debris that contacted the
19 exhaust system,” which caused the fire. (*Id.*)

20 On December 21, 2018, the Court amended the expert disclosure deadlines as follows:

21 Plaintiff's Rebuttal Expert Disclosures	January 18, 2019
22 Defendants' Rebuttal Expert Disclosures	February 18, 2019
23 Discovery cutoff	February 28, 2019

24 (Dkt. No. 25.) On January 18, 2019, Plaintiff disclosed the report of Grzegorz Buczkowski,
25 Ph.D., who opined that “the space above the undercarriage paneling on a 2012 Honda CRV is an
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1 ideal rodent nesting habitat.” (Dkt. No. 28 at 4.) Buczkowski concluded that “[b]ecause nests are
2 made almost exclusively of dry, potentially flammable material . . . the nest may pose a fire
3 hazard when exposed to high temperatures during vehicle use.” (*Id.*) Defendants neither sought
4 to depose Buczkowski, nor disclose rebuttal experts. (Dkt. No. 30 at 2.) Trial is currently
5 scheduled for April 22, 2019. (Dkt. No. 15.)

6 On February 8, 2019, Defendants filed a motion to exclude Buczkowski from trial
7 because his opinions do not represent rebuttal testimony and were therefore untimely disclosed
8 under Federal Rule of Civil Procedure 26(a)(2)(D). (Dkt. No. 28 at 5–7.) Plaintiff asserts that
9 Buczkowski’s opinion was offered to rebut Brown and Schiebe’s opinions that the fire was
10 caused by “duff” and other flammable debris on the roadway. (Dkt. No. 30 at 7.)

11 Defendants assert that Buczkowski’s testimony regarding rodent nesting does not rebut
12 Brown or Scheibe’s opinions, neither of whom opined about whether the “space above the
13 undercarriage paneling on a 2012 Honda CRV is an ideal rodent nesting habitat.” (Dkt. No. 28 at
14 5.) Because Buczkowski’s testimony is not “intended to solely contradict or rebut evidence on
15 the same subject matter” presented by Defendants’ experts, Defendants argue that Plaintiff’s
16 disclosure of the testimony was untimely. (*Id.*) (citing Federal Rule of Civil Procedure
17 26(a)(2)(D)(ii)). Defendants assert that exclusion is the proper remedy pursuant to Federal Rule
18 of Civil Procedure 37(c)(1).

19 **II. DISCUSSION**

20 Absent a stipulation or court order to the contrary, expert disclosures must be made at
21 least 90 days before trial. Fed. R. Civ. P. 26(a)(2)(D)(i). Parties may disclose an expert witness
22 after that deadline only if the “evidence is intended *solely* to contradict or rebut evidence on the
23 same subject matter identified by another party.” Fed. R. Civ. P. 26(a)(2)(D)(ii) (emphasis
24 added). The Ninth Circuit has not specified a particular rule for determining whether rebuttal
25 evidence is proper but has held instead that this is a determination “within the sound judicial
26 discretion of the trial judge.” *Rodella v. United States*, 286 F.2d 306, 309 (9th Cir. 1960). This

1 Court has ruled that rebuttal testimony cannot be used to “advance new arguments or new
2 evidence.” *Fed. Trade Comm’n v. Amazon.com, Inc.*, Case No. C14-1038-JCC, Dkt. No. 139 at 3
3 (W.D. Wash. 2016); *see also Daly v. Far E. Shipping Co. PLC.*, 238 F. Supp. 2d 1231, 1241
4 (W.D. Wash. 2003) (excluding proposed rebuttal testimony that was not offered “solely to
5 contradict or rebut” other expert testimony). “If a party fails to provide information or identify a
6 witness as required by Rule 26(a) or (e), the party is not allowed to use that information or
7 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
8 substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

9 Buczowski’s report cannot fairly be characterized as rebuttal testimony because it is not
10 offered solely to contradict Defendants’ experts, but to reinforce Arndt’s opinion that organic
11 material inside Ms. Meike’s CR-V caused the fire. Buczowski’s report does not address or
12 respond to information contained in Brown or Schiebe’s reports, but offers a new theory in
13 support of why the CR-V could have contained a specific kind of flammable organic material
14 (*i.e.* rodents’ nests). (Dkt. No. 30 at 2.) Both Brown and Scheibe opined that the fire was likely
15 caused by organic material outside the CR-V, not that the vehicle was designed in a way that
16 prevented organic material from accumulating in the space adjacent to the catalytic converter.
17 (Dkt. No. 28 at 3.) In this regard, Buczowski’s testimony regarding rodent nesting “did not
18 address any particular opinion in [Brown or Scheibe’s reports], and is simply “a new means to
19 support [Plaintiff’s] original opinion” regarding the cause of the fire. *See Daly*, 238 F. Supp. at
20 1241. Plaintiff could have offered Buczowski’s testimony regardless of what Defendants’
21 experts’ concluded. Since Buczowski’s report was not rebuttal evidence, it should have been
22 disclosed no later than October 26, 2018. (*See* Dkt. No. 22); Fed R. Civ. P. 26(a)(2)(D).

23 Although Plaintiff’s disclosure of Buczowski’s report was untimely, the Court FINDS
24 that it was harmless. Pursuant to the parties’ stipulation, Plaintiff disclosed Buczowski’s report
25 on January 18, 2019. (Dkt. No. 22.) That was 31 days before Defendants needed to disclose their
26 rebuttal experts, 41 days before the close of discovery, and 94 days before trial. (Dkt. No. 25.)

1 Defendants had sufficient time to depose Buczkowski and identify rebuttal experts, but they did
2 neither. (Dkt. No. 30 at 10.) And while Plaintiffs' disclosure was untimely, it was still more than
3 90 days before trial—the amount of time typically required for filing expert disclosures under the
4 Federal Rules. *See* Fed. R. Civ. P. 26(a)(2)(D). This case simply does not involve the kind of
5 eleventh hour disclosure that prejudices Defendants in a way that would mandate exclusion.

6 Finally, and completely unrelated to Defendants' motion, the Court requires a
7 continuance of the current trial date because of a conflict with its calendar. Rather than excluding
8 Buczkowski from trial, the Court concludes that a trial continuance is appropriate to prevent any
9 prejudice to Defendants. A continuance will allow Defendants to depose Buczkowski and
10 identify rebuttal experts, if they so choose.

11 **III. CONCLUSION**

12 For the foregoing reasons, Defendants' motion to exclude (Dkt. No. 22) is DENIED. In
13 accordance with the Court's order:

14 1. The trial, currently scheduled for April 22, 2019, is hereby VACATED.

15 2. The parties shall meet and confer to select a new trial date that is no later than October
16 31, 2019. No later than March 20, 2019, the parties shall file a motion notifying the Court of
17 their jointly proposed trial date(s).

18 3. If Defendants choose to depose Dr. Buczkowski, they must do so no later than 60 days
19 before the new trial date adopted by the Court.

20 4. If Defendants choose to disclose rebuttal experts, they must do so no later than 45 days
21 before the new trial date adopted by the Court.

22 5. If Defendants choose to designate rebuttal experts, Plaintiff may depose them no later
23 than 30 days before the new trial date adopted by the Court.

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1 DATED this 14th day of March 2019.

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5 John C. Coughenour
6 UNITED STATES DISTRICT JUDGE
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